

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 12,079

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Appeal of )

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INTRODUCTION

The petitioner appeals to the Human Services Board for an order expunging from the "registry" maintained by the Department of Social and Rehabilitation Services (SRS)

a report of child sexual abuse allegedly perpetrated by him. The issue is whether the report was "substantiated" within the meaning of the pertinent statutes.

FINDINGS OF FACT

In May, 1992, a school guidance counselor reported to SRS that a thirteen-year-old girl in the sixth grade had alleged she was inappropriately touched by the petitioner. The Department's records indicate that an SRS social worker (who was not an "investigator") and a local police officer went to interview the girl. The Department introduced no records of any sort relating to this interview. The social worker has apparently left the employ of the Department and was not called as a witness. The police officer is reportedly now working for another town, but he was also not called as a witness.

The only evidence submitted by the Department relating to that particular "investigation" was a copy of a form letter (undated!) allegedly signed by the social worker and addressed in the petitioner's name, but using an incorrect mailing address for him. It states only that "the report of child abuse/neglect made against you and which was investigated in May of 1992 has been substantiated in accordance with the provisions of Chapter 14 of Title 33 of the Vermont Statutes. If you have any questions, please contact me at (phone number)."

The petitioner denies ever receiving this notice. The Department admits that the petitioner was never directly contacted or interviewed at that time.

The first inkling the petitioner had of the allegations against him came a full year later. The petitioner's wife is a registered day care provider. In May 1993, she filed her annual reapplication for registration

with the Department. On May 20, 1993, the Department sent her a letter saying that it was going to revoke her day care registration because "(y)our husband...has a report of child sexual abuse substantiated against him in regard to an incident with a 13 year old girl, M.S." The petitioner appealed this decision, which, after she retained an attorney and the issue was further clarified (see infra), turned into the instant fair hearing.

At the hearing (held on October 26, 1993) the Department offered no explanation for the fact that the petitioner's day care license wasn't revoked when the alleged incident was first investigated other than to say that the case "fell through the cracks." At any rate, after the petitioner's wife filed her appeal, the Department agreed to investigate the allegations further. Apparently, both the social worker and the police officer involved in the original "investigation" were (for reasons not clearly explained at the hearing) either unavailable or unwilling to cooperate with the Department in its reinvestigation.

The SRS investigator assigned to the new investigation interviewed the girl who had made the allegations against the petitioner. The girl (now fourteen) reportedly told her that the incident occurred the year before when she was visiting the petitioner's granddaughter, a school classmate, at the granddaughter's house at a time when the petitioner was also visiting. (The granddaughter's mother is the petitioner's adult daughter.) The girl reportedly alleged that she and the granddaughter were undressing the granddaughter's handicapped brother (the petitioner's grandson) in his room while the petitioner was standing in the doorway to the room. She said she tried to grab some lifesavers out of the petitioner's pocket, but that he grabbed her with one arm and held her to him while he "kinda grabbed" both her breasts through her clothes, and then also touched her vaginal area (through her clothes).

The girl also alleged that once before that time, while she and the petitioner's granddaughter were "wrestling" with the petitioner over some lifesavers, that the petitioner placed one hand on her breast and his other hand on his granddaughter's breast. The latter-described incident allegedly occurred in the kitchen of the granddaughter's house while the petitioner's wife, daughter, and son-in-law were also present.

At the hearing the investigator admitted that the above descriptions of touching differed in several respects from the Department's records of the girl's original allegations. Originally the girl had alleged that the petitioner had put his hand under her shirt and had touched only one of her breasts. She had not alleged any vaginal-area touching in her previous interview, nor had she mentioned any other incident.

The investigator then interviewed the petitioner, who admitted that his family (the petitioner and his wife have seven grown children and fifteen grandchildren) knows that he always keeps lifesavers in his shirt pocket, and that his grandchildren and their friends often try to take them out of his pocket, which often involves some playful poking and tickling. The petitioner vehemently denied, however, that he had ever inappropriately touched his granddaughter or any of her friends. He stated that during the time in question he had a painful shoulder injury and could not have grabbed the girl as she had alleged.

The investigator testified that she found the petitioner generally credible but chose to substantiate the girls allegations (despite the admitted discrepancies) based on her "experience" that "kid's don't lie" about such events. The investigator stated she took notes while she was interviewing the girl and the petitioner, and then used them to make a "report" of her investigation. Only the finished report was introduced as evidence.

Other than the testimony of the investigator and her written report, the Department introduced no other evidence that the alleged incident was "substantiated." The investigator did not attempt to interview the petitioner's granddaughter or any of the other potential witnesses (see supra) to at least one of the alleged incidents. Nor does it appear that she attempted to check the consistency of the girl's allegations with what she may have told the school guidance counselor, who first brought the allegations to the attention of SRS.

At the hearing the petitioner testified consistently with what he had told the investigator. His testimony was corroborated by that of his granddaughter, his wife, <sup>(1)</sup> and his daughter (the granddaughter's mother). The granddaughter admitted that she and her friends often would poke and tickle the petitioner--and he would do it back-- when they tried to take his lifesavers. She strongly denied, however, that the petitioner had ever touched her or any of her friends in an inappropriate manner.

Other compelling testimony in the petitioner's behalf was that of his daughter and granddaughter that there is no way the petitioner and the girl in question would have ever been in the granddaughter's brother's room together. They testified that the brother is severely handicapped and that the family always attends to his personal needs in strict privacy; and that at no time would one of the granddaughter's friends have been in his room while he was being undressed. They also testified that they all would have been in the kitchen area when the other alleged incident took place, and that no such thing ever happened. The petitioner's daughter works with the head start program and appeared sensitive to issues of child abuse. She did not strike the hearing officer as an individual who would try to protect her father if she observed or thought that he had touched her daughter, or one of her daughter's friends, in the manner alleged. The hearing officer deemed the petitioner, his wife, his daughter, and his granddaughter to be highly credible individuals.

The Department's evidence, on the other hand, consisted solely of the hearsay testimony and questionable "opinion" (see infra) of its investigator. The Department admits that its most recent investigation revealed significant discrepancies in the allegations of the girl from her original statements. Despite this, the investigator did not attempt to visit the scene of the alleged incidents or check with the person to whom the girl had originally made the allegations. Nor did she attempt to interview one certain eyewitness (the granddaughter) to both alleged incidents and at least four potential eyewitnesses to the second alleged incident. Indeed, despite than the predisposition of the Department's investigator to believe the girl, it is hard to find any credible evidence in the record in this matter that would support the Department's conclusion that the allegations were "substantiated."

### ORDER

The petitioner's application to expunge the report of sexual abuse made against him is granted.

### REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or

the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

...

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the Department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that "the report is based upon accurate and reliable information", but also that the information "would lead a reasonable person to believe that a child has been abused or neglected". 33 V.S.A. § 4912(10) and Fair Hearings No. 11,322, 10,136, 8646, and 8110.

The Board has consistently held that under the above statutes, but also as a matter of basic due process and fundamental fairness, the Department has a duty to pursue and develop sufficient factual evidence before it "substantiates" a report of child abuse. See Fair Hearing Nos. 11,322, 9112, 8837, and 8646. 33 V.S.A. § 4915 requires the Department, as part of its "investigation", to at least attempt to visit the "location" where the alleged abuse took place. The Board has also noted that a competent investigation should also include attempts to interview any reported eyewitnesses and other persons to whom the child may also have reported the alleged abuse. Fair Hearing No. 11,322, 9,112, and 8,646.

A predisposition on the part of a Department investigator to believe a child who alleges sexual abuse may well be justified in terms of the Department's statutory duty (and unquestionable commitment) to protect children who may be the victims of such abuse. However, as unfortunately appears to have been the case herein, it can never be a substitute for, or an excuse for not, conducting a thorough and unbiased "investigation" of such allegations. See 33 V.S.A. § 4915.

Also, in light of the by-now-dozens of Human Services Board rulings over the years as to the Department's burden and standard of proof in these matters, and the recent pronouncement of the Vermont Supreme Court upholding those standards,<sup>(2)</sup> it is incomprehensible (and, perhaps, inexcusable, from the standpoint of ultimately "protecting" those children) that the Department's investigators still make no attempt to record their interviews with child witnesses. The Board has repeatedly noted that without reliable evidence as to what the child actually said, it is virtually impossible to even begin to weigh, much less to be

persuaded by, any "opinion" of a Department investigator--regardless of that investigator's "expertise".<sup>(3)</sup>

Even though the Department, in effect, had "two bites of the apple" in this matter, based on the evidence (or lack thereof) it cannot be found that its determination was "based upon accurate and reliable information that would lead a reasonable person to believe" that the alleged victim was sexually abused

by the petitioner. Therefore, it must be concluded that the report in question was not "substantiated"; and the petitioner's application to expunge it from the SRS "registry" is granted. <sup>(4)</sup>

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1. The petitioner's wife runs her day care in her own home. She testified, however, that she and the petitioner frequently visit at their daughter's home, usually together.

2. In re Bushey-Combs; No. 91-393 (1993).

3. See Fair Hearing Nos. 11,232, 10,553, 10,136, 9,989, 9,112, and 8,837.

4. It is assumed that this decision will be dispositive of any issues surrounding the petitioner's wife's day care registration.